91-1358

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JOSEPH SCHWARTZ,

Petitioner,

vs.

CITY OF FLINT,

Respondent.

Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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AND DILL, P.C.
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QUESTION PRESENTED

MAY A STATE COURT BAR A FEDERAL CLAIM UNDER 42 U.S.C. §1983 FOR COMPENSATION FOR AN UNCONSTITUTIONAL TAKING OF PETITIONER'S PROPERTY BECAUSE HE DID NOT ASSERT IN A PRIOR STATE ACTION THE FEDERAL CLAIM WHICH WAS NOT THEN RIPE OR JUSTICIABLE UNDER DECISIONS OF THIS COURT?

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OPINIONS BELOW AND JURISDICTION

Petitioner filed suit under 42 U.S.C. §1983 for compensation for unlawful taking of his property by the City of Flint. The City's motion for summary disposition, seeking dismissal, was denied from the bench by the circuit court for Genesee County, Michigan on September 11, 1989 (App. 1-5). Reconsideration was denied (App. 6-7) and then the City obtained leave to appeal. By opinion dated January 22, 1991, 187 Mich. App. 191; 466 N.W.2d 357 (1989) (App. 8), the Michigan Court of Appeals reversed, dismissing Petitioner's claims under both federal and state law. Timely application for leave to appeal to the Supreme Court of Michigan was denied, one justice dissenting, October 11, 1991 (App. 15), and timely motion for reconsideration was denied by order of the latter court December 20, 1991, one justice again dissenting and urging grant of leave to appeal (App. 16). This petition for certiorari to the Michigan Court of Appeals, as the state's "court of last resort," is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTION AND STATUTE INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,

> any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The pertinent language of Amendment V to the Constitution of the United States provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Pertinent language of Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner, Joseph Schwartz, the owner of a 28-acre parcel of undeveloped land in the City of Flint, Michigan, challenged respondent City's zoning restrictions on his property by complaint filed in 1971 in the Genesee County Circuit Court, a state court of general jurisdiction. The complaint sought a declaratory judgment that the restrictions were invalid under state law and their enforcement should be enjoined. The City vigorously resisted and the case went twice to the Michigan Court of Appeals and twice to the Supreme Court of Michigan. In 1986 the latter court sustained Petitioner's persistent claim that the zoning was arbitrary and invalid and resulted in an unconstitutional taking of his property, but remanded the cause for a determination of the reasonableness of his proposed use, *Schwartz v. City of Flint*, 426 Mich. 295 (1986).

After extended negotiations before re-trial, the parties ultimately agreed to entry of a final judgment in that action which permitted development of the property with town houses and garden apartments essentially as Petitioner had originally proposed (App. 17-18). After termination of that action, Petitioner requested compensation from the City for the unlawful taking of his property, noting that his accountants had calculated his losses in excess of $7,000,000. When this request was summarily rejected, Petitioner filed a complaint in the Genesee County Circuit court.

His complaint contained the following allegation:

> "The unconstitutional assertion by Defendant City of its zoning authority constituted a 'constructive taking' or 'de facto taking' of Plaintiff's property within the meaning of the Uniform Condemnation Procedures Act, MCLA 213.51, MSA 8.265, and effected inverse condemnation of Plaintiff's property, depriving him of all reasonable and viable use of his land and his reasonable, investment-backed expectations. This constituted a taking of the property without payment of just compensation, in violation of Article X, Section 2 of the Michigan Constitution of 1963 and the Fifth Amendment to the United States Constitution." (§13)

The following paragraph of the complaint recited:

> "The acts and omissions of Defendant City further deprived Plaintiff of his property without due process of law, in violation of Article I, Section 17 of the Michigan Constitution of 1963 and the Fourteenth Amendment to the United States Constitution. Plaintiff is entitled to redress from this Court pursuant to the Constitutional provisions cited in this and the preceding paragraph and 42 USC 1983." (§14)

The complaint also recited (§9) that it had been determined in *Schwartz v. City of Flint*, 92 Mich. App. 495, 503; 285 N.W.2d 344 (1979) that the zoning ordinance is "taking from plaintiffs the use of their property without just compensation, contrary to the Federal and State Constitutions;" that the judgment of the Circuit Court of April 22, 1988 (App. 17-18) finally determined the "reasonable" permitted use of the property (§10); and that demand for compensation was made March 3, 1989 (§11) and rejected by the City March 15, 1989 (§12).

Before answer, the City moved for summary disposition of dismissal on the grounds, *inter alia*, that the former judgment barred any claim for compensation under state *res judicata* doctrine. Petitioner pointed out that no claim for compensation had been asserted or litigated in the prior declaratory judgment action. In negotiating the judgment, Petitioner had expressly "reserved" the right to file a subsequent claim for compensation (Affdt of Jay Tower, §3). Counsel for the City himself acknowledged that under decisions of this Court, Petitioner had no federal cause of action for compensation while "there was not a final determination of how the land could be used" (App. 4). The Circuit Court rejected the City's claim of *res judicata*, denied its motion from the bench (App. 5) and thereafter denied reconsideration (App. 6-7).

The City obtained leave to appeal. Petitioner's brief in the Michigan Court of Appeals again resisted the City's claim of *res judicata* under both state and federal law, invoking (p. 15) *Cromwell v. Sac County*, 94 U.S. 351, 353 (1877), and (p. 18) *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 328 (1955), as well as *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985). In a *per curiam* opinion, a three-judge panel of the Court of Appeals reversed, 187 Mich. App. 191; 466 N.W.2d 357 (1989) (App. 8-14). Petitioner thereupon filed an application to the Supreme Court of Michigan for leave to appeal. Among the grounds for the application were:

> "(c) The Court of Appeals wrongfully barred plaintiff in this action brought under both state and federal law, including 42 USC 1983, from any claim for compensation for a

temporary regulatory taking of his property by the City of Flint on the ground that plaintiff could and should have asserted such claim in the prior action which this Court remanded in 1986 for the specific and limited purpose of determining the reasonableness of plaintiff's proposed use of the property, *Schwartz v. City of Flint*, 426 Mich. 295, 330 (1986).

* * *

(e) The Court of Appeals wrongfully barred plaintiff's claim under federal law in this case because he did not seek to assert an unripened and anticipatory federal claim for just compensation in the former suit which was terminated in 1988. The asserted ground for barring this claim, which did not become justiciable until more than a year after termination of the former suit, violates federal law and the Supremacy Clause of the United States Constitution."

The Supreme Court of Michigan, by order dated October 11, 1991, denied the application for leave, one justice dissenting (App. 15). Petitioner then filed a timely motion for reconsideration on the following grounds, *inter alia*:

"1. Rejection without trial or mention of plaintiff's federal constitutional claims under 42 USC 1983 on the basis of a purported state court rule is an insufficient and improper "excuse" for denying federal rights. *Howlett v. Rose*, 496 U.S. ___, 110 L.Ed.2d 332, 348-350 (1990); *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990).

2. Refusal to grant leave to review the decision of the Court of Appeals violates the

Supremacy Clause of the United States Constitution, Article IV, §2, clause 2. See *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. ___, 107 L.Ed.2d 420, 428 (1989)."

By order of December 20, 1991, the motion for reconsideration was denied, one justice again dissenting and urging grant of leave to appeal (App. 16).

REASONS FOR GRANTING THE WRIT

The challenged decision of the Michigan Court of Appeals is contrary to the decision of this Court in *Howlett v. Rose*, 496 U.S. ___, 110 L.Ed.2d 332 (1990) which reiterated established principles that "The elements of and defenses to a federal cause of action are defined by federal law" (p. 353); that when a state has opened its doors to suits under 42 U.S.C. §1983, the Supremacy Clause means that "federal law is law in the State" (p. 356) and that the State may not without valid excuse erect a defense to a federal claim which "would not be available if the action had been brought in the federal forum" (p. 342).

While the prior suit was pending Petitioner had no existing federal cause of action for compensation for an unconstitutional regulatory taking. His federal claim ripened months after the former suit was terminated by judgment. No state construction or application of *res judicata* doctrine may bar or preclude Petitioner's subsequent assertion of his federal right. *See Central Vermont Railway Company v. White*, 238 U.S. 507, 512 (1915); *Atlantic Coast Line Railroad Company v. Burnette*, 239 U.S. 199, 200-201

(1915). A federal right "cannot be defeated by the forms of local practice," *Brown v. Western Railroad of Alabama*, 338 U.S. 294, 296 (1949). In holding that a state notice-of-claim statute may not be invoked to bar or discriminate against a federal claim under 42 U.S.C. §1983, this Court emphasized in *Felder v. Casey*, 487 U.S. 131 (1988) that the civil rights statute was specifically designed to create "a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority" (487 U.S. at 139) and that "however laudable the State's interest in controlling liability expenses," this is "patently incompatible with the compensatory goals of the federal legislation" (487 U.S. at 143).

More than 20 years after he first challenged Flint's zoning restrictions on use of his land, Petitioner finally was able to obtain the City's consent to entry of a judgment which permitted him to develop it essentially as he had originally proposed. The judgment entered in the former suit on April 28, 1988 (App. 17-18) constituted a "final decision regarding the application of the regulations to the property," *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194-195 (1985), or, as stated in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986), "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." The duration and extent of the "taking" having been fixed by the judgment, Petitioner then sought to determine "what, if any, compensation," *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 350 (1986), the City of Flint intended to provide. His request for compensation was rejected outright by the City, March 15, 1989, many months after termination of

the former suit. Only then did Petitioner have a ripened federal cause of action for just compensation, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 311 (1987), which claim he appropriately asserted in his complaint herein.

Petitioner did not, of course, allege a federal right to compensation in his 1971 complaint or during the pendency of the former action because he then had no justiciable federal claim. However, expansively applied, *res judicata* "cannot be given the effect of extinguishing claims which did not even exist and which could not possibly have been sued upon in the previous case." *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 328 (1955). "The new liability was not affected by what had been adjudicated before." *Chapman v. Crane*, 123 U.S. 540, 548 (1887).

The challenged decision of the Michigan Court of Appeals dismissing the present action makes no direct mention of Petitioner's federal claim under 42 U.S.C. §1983. This represents a discriminatory refusal even to consider Petitioner's federal cause of action,[1] or a determination that it is barred by state-fashioned *res judicata* doctrine. In either event, it invites this Court's attention for whatever "springes the State may set," the assertion of federal rights is "not to be defeated under the name of local practice." *Staub v. City of Baxley*, 355 U.S. 313, 318,

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[1] The court's reference (App. 13) to *First English Evangelical Lutheran Church of Glendale*, 482 U.S. 304 (1987) plainly confuses the issue of ripeness of a regulatory taking claim with the period for which compensation for such a taking is permitted. This case involves no *physical* intrusion by government.

319 (1958). The Michigan court implies that under state law a claim – not yet justiciable under federal law – for compensation for an unconstitutional taking should be coupled in a single action to declare a zoning restriction invalid, and that amendment of the original 1971 complaint "should have been a viable means for plaintiff to establish his claim for damages in that suit." (App. 12). This is disingenuous. Under Michigan practice such an amendment would, at the least, have required special leave of the trial court. It is questionable whether such leave would have been granted after years of litigation of the original complaint and its appellate scrutiny in 92 Mich. App. 495 (1979); 408 Mich. 905 (1980); 120 Mich. App. 449 (1982); and 426 Mich. 295 (1986).

In *Poirier v. Grand Blanc Township*, 167 Mich. App. 770 (1988), cited by the court below,[2] the parties and the court apparently agreed without question that the complaint could be amended before the cause was remanded for trial; here it cannot be presumed that so obdurate a municipality as Flint would have similarly acquiesced in assertion of a new and distinct cause of action, *See Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 587 (11th Cir. 1990); *cf. Sea-Land Services v. Gaudet*, 414 U.S. 573, 578 (1974). But such an amendment, even if permitted, could not have made Petitioner's federal claim ripe or justiciable. If asserted in a federal forum, it would have been dismissed as premature. *See, e.g., Hammond v. Baldwin*, 866 F.2d 172, 178 (6th Cir. 1989); *Landmark Land Company of Oklahoma v.*

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[2] Notably, the *Poirier* decision was not published until after entry of the consent judgment on April 22, 1988 (App. 17-18) and thus had no precedential effect (MCR 7.215).

Buchanan, 874 F.2d 717, 719-720 (10th Cir. 1989); *Estate of Himelstein vs. City of Fort Wayne, Indiana*, 898 F.2d 573, 576 (7th Cir. 1990). A federal court has no jurisdiction to hear an unripe claim, *Austin v. City and County of Honolulu*, 840 F.2d 678, 682 (9th Cir. 1988); *Eide v. Sarasota County*, 895 F.2d 1326, 1328-1329 (11th Cir. 1990), and a state court is plainly without power to confer federal jurisdiction or to penalize a litigant for not acquiescing in such an unauthorized attempt.

The federal claim for compensation was not presented in the former suit and could not have been presented; only after the original action was terminated could a justiciable federal claim arise. There was, accordingly, no "valid excuse" for the court below to reverse the circuit court which had entertained this action under 42 U.S.C. §1983. Application of the state's notion of *res judicata* to a nonjusticiable claim is as idiosyncratic and unjustified as Florida's effort to restrict the availability of the same statute under its immunity doctrines, rejected in *Howlett v. Rose*, 496 U.S. ___ (1990); 110 L.Ed.2d 332 (1990). As the Court there emphasized (p. 350):

> "An excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."

Even when the amount involved is minimal, this Court will grant a petition for certiorari to redress a substantial infringement of due process, *Thompson v. City of Louisville*, 362 U.S. 199, 203 (1960). This Petitioner, with a far larger investment in personal effort, anguish and

funds, has been denied all opportunity for redress of his claim for fair compensation under federal law.

Today federal dockets are congested, not the least by actions brought under 42 U.S.C. §1983. There is good reason to encourage litigation of such claims in the courts of the state. But litigants are entitled to assurance that their federal rights will receive no less consideration in the courts of the states than in a federal forum. Michigan courts plainly had jurisdiction to consider Petitioner's federal claim and, accordingly, a duty to exercise it. *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U.S. 1, 58 (1912). The court below either ignored the federal claim or imposed a barrier to its exercise which was unjustified. Petitioner, other victims of abusive zoning and, indeed, litigants seeking vindication of other federal claims in state courts, have a heavy stake in this Court's removal of such a barrier.

RELIEF

For the foregoing reasons Petitioner prays that this petition for writ of certiorari be granted. In view of the Court's recent restatement of controlling principles, summary remand to the Michigan Court of Appeals may be appropriate. *District Lodge 34 v. Cavett Co.*, 355 U.S. 39 (1957); *DeVries v. Baumgartner's Electric Construction Co.*,

359 U.S. 498 (1959); *Mason v. City of Biloxi*, 385 U.S. 370 (1966).

Respectfully submitted,

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AND DILL, P.C.
By: ERWIN B. ELLMANN*
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DATED: February 10, 1992.

STATE OF MICHIGAN

SEVENTH JUDICIAL CIRCUIT COURT
(COUNTY OF GENESEE)

JOSEPH SCHWARTZ, PLAINTIFF,	)	
-VS-	)	FILE NUMBER: 89-104678-NZ
THE CITY OF FLINT, A MUNICIPAL CORPORATION, DEFENDANT.	)	

MOTION

BEFORE THE HONORABLE VALDEMAR L. WASHINGTON, CIRCUIT JUDGE

FLINT, MICHIGAN – MONDAY, AUGUST 21, 1989

APPEARANCES:

FOR THE PLAINTIFF:	MR. ERWIN B. ELLMANN (P-13168) Attorney at Law.
FOR THE DEFENDANT:	MR. BARRY A. WOLF (P-40709) Assistant City Attorney.
REPORTED BY:	Robert F. Gunterman, CSR 0198 Certified Shorthand Reporter.

THE COURT: The matter of Schwartz versus the City of Flint, 89-104678-NZ.

Mr. Wolf and Mr. Tower. As I read the response filed by the City of Flint, they're saying that somehow Mr. Schwartz was precluded from going forward with his damages claim because when they were discussing the resolution of the original litigation, there was never a mention of going forward with the damages claim.

And I guess what I would ask [sic] counsel for the City: If you're saying there's some sort of release document or some sort of document that precludes Mr. Schwartz from proceeding, I'd like to see it. I didn't see it in any of your responsive pleadings. But if there's no document like that, I think you're baying at the moon at this point.

MR. WOLF: Your Honor, there is no signed release that, that this was a final, final agreement, other than the judgment itself which says that it's a final judgment. There is no document that precludes damages. Our position is that the issue of damages is barred either by the doctrine of res judicata and then the Court Rules that were cited.

THE COURT: Well, except I don't see anything in the judgment that says Mr. Schwartz is unable to have – come back for damages. Am I missing that language? If so, please point it out to me.

MR. WOLF: No, there is nothing in the document that says that they're precluded from coming back for damages.

THE COURT: The Supreme Court says that if the property's taken, even if it's a temporary take, people

can proceed on a damages claim. How would that be something that's res judicata if the original judgment didn't speak to it?

MR. WOLF: Well, we don't – at this point we're not disputing whether – what the Supreme Court has said in relation to damages for temporary taking. Our dispute is when that claim should have been raised.

THE COURT: All right, but what I'm – but you acknowledge that there's, one, no release that prevents Mr. Schwartz from coming into court seeking the determination of damages; you acknowledge that.

MR. WOLF: There is no, there is no release on that.

THE COURT: Secondly, there's nothing in the judgment that was entered in the other litigation, I guess that's 71-20222-CZ, that would – that spoke to the issue of damages.

MR. WOLF: That's correct.

THE COURT: But yet you say somehow he ought to be barred from coming into court in this action in his damages claim.

MR. WOLF: That's correct, because our position is that damages is an issue that, that could have and should have been litigated with the issue of the taking.

THE COURT: All right. But you recognize that only until such time as that there's a determination on the merits does res judicata come into play.

MR. WOLF: And our position is that when we look at the determination on the merits, it's my understanding from the broad definition of res judicata that all issues that could have been and should have been determined in the first litigation are precluded from being raised in the second litigation, and you determine those issues by whether the same facts and evidence would be used to, to prove the second, the second issue, the damage issue.

THE COURT: Well, how can that be true then if you look at the fact that the Supreme Court only recently came out with that decision to clarify it whether or not you could have money damages even for a temporary take?

MR. WOLF: Well, the issue of money damages is – has been addressed by the United States Supreme Court since 1981; first in dissent in SanDiego Gas & Electric versus SanDiego, then again in the cases – two of the cases cited by the Plaintiff in their responsive brief, Williamson Planning Commission and then MacDonald, Sommer & Frates, I believe.

And in those cases the issue of damages was raised at the same time that the issue of declaratory judgment was raised, and the reason that they found that the issue of damages was premature was because there was not a final determination of how the land could be used in those cases.

THE COURT: I know, but I'm just saying this issue wasn't clarified on the state level. I mean, we're here in state court notwithstanding our wonderful

Supreme Court, U.S. Supreme Court. That issue wasn't decided until some time recently, was it?

MR. WOLF: Number one, the Michigan Supreme Court –

THE COURT: Yes or no?

MR. WOLF: I don't believe that it's been decided by, by the Michigan Supreme Court at all.

THE COURT: Then maybe they'll have the chance with this case.

MR. WOLF: Possibly.

THE COURT: Your motion is denied.

* * *

STATE OF MICHIGAN

SEVENTH JUDICIAL CIRCUIT COURT
(COUNTY OF GENESEE)

JOSEPH SCHWARTZ, PLAINTIFF,	)	FILE NUMBER: 89-104678-NZ
-VS-	)	
THE CITY OF FLINT, A MUNICIPAL CORPORATION, DEFENDANT.	)	

MOTION

BEFORE THE HONORABLE VALDEMAR L. WASHINGTON, CIRCUIT JUDGE

FLINT, MICHIGAN – MONDAY, SEPTEMBER 11, 1989

APPEARANCES:

FOR THE DEFENDANT: MR. BARRY A. WOLF (P-40709)
Assistant City Attorney.

REPORTED BY: Robert F. Gunterman, CSR 0198
Certified Shorthand Reporter.

Flint, Michigan

Monday, September 11, 1989

THE COURT: The matter of Schwartz versus the City of Flint, 89-104678-NZ.

Mr. Wolf, this is your motion for reconsideration of the decision granted upon 8-21 relative to the damages

claim of Plaintiff Schwartz. Since oral argument's not permitted, I'm not going to grant any.

I've reviewed the motion that was filed and I find nothing in it that sets forth any grounds for changing the decision that I rendered on the 21st, which was that you admit that there is not order. The fact that there is a proposed order that was bandied about during settlement negotiations and was not signed doesn't carry any weight with me. It tells me only that someone didn't do his or her homework in terms of getting this included in the final proposal.

Based upon that, there's nothing to reconsider. There's no release; there's no judgment that says it's not to be included or that it was wrapped up in the first package. Therefore your motion for reconsideration is denied.

MR. WOLF: Okay, thank you

* * *

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH SCHWARTZ,
Plaintiff-Appellee,

v

CITY OF FLINT,
Defendant-Appellant.

January 22, 1991
10:10 a.m.

No. 121219

FOR PUBLICATION

Before: Sullivan, P.J., and Maher and Griffin, JJ.

PER CURIAM.

Defendant appeals by leave granted, the denial of its motion for summary disposition. Defendant argues that plaintiff's claim, seeking money damages for an unconstitutional taking of his property, is barred by res judicata. We agree and reverse.

This action represents a continuing legal saga that began in 1971, when plaintiff, desiring to erect townhouses and apartment buildings on his property, first instituted suit claiming that defendant's single family residential zoning ordinance was unreasonable as applied to his land. Plaintiff's action was one for declaratory relief, seeking to have the ordinance declared unconstitutional. Although a consent judgment was agreed to in 1973, it was set aside after a group of neighboring property owners were permitted to intervene in the suit. The case then proceeded to trial, resulting in a verdict in favor of defendant. This Court reversed, however, holding that defendant's zoning ordinance was unreasonable as

applied to plaintiff's property, and therefore, constituted a "taking [of] property without just compensation, contrary to the Federal and State Constitutions."[1] *Schwartz v. City of Flint*, 92 Mich App 495, 503; 285 NW2d 344 (1979). This Court then remanded to the circuit court for the determination of an appropriate use pursuant to the procedures set forth in *Zaagman, Inc v. Kentwood*, 406 Mich 137; 277 NW2d 475 (1979).

On remand, the circuit court did not accept either party's proposed use, but instead, adopted its own "mid-satisfactory" use. Plaintiff appealed once again and this Court, although modifying the circuit court order in part, affirmed in all other respects. *Schwartz v. City of Flint*, (After Remand), 120 Mich App 449; 329 NW2d 26 (1982).

Plaintiff then appealed to our Supreme Court, which proceeded to overrule *Zaagman*, finding it to be an improper usurpation by the judiciary of a legislative function. *Schwartz v. City of Flint*, 426 Mich 295, 305; 395 NW2d 678 (1986). Adopting the "Illinois approach," the Court held that where a zoning ordinance is found to be unconstitutional as applied to a plaintiff's property, the plaintiff's proposed use of the property is to be permitted provided that use is reasonable. *Id.*, pp 325-330. The Court then remanded the case to the trial court for a determination on the question of reasonable use. *Id.*, p 330.

Following the remand, the parties entered extended negotiations to settle the case and on February 8, 1988, the City of Flint adopted a resolution agreeing to a specific use of the property. On April 22, 1988, the circuit court

then entered a "Final Judgment" providing for the development of the subject property in accordance with an agreed upon plan of use. The judgment indicated that the use was "fair and reasonable and in the best interests of the parties hereto, thereby settling this action."

Although seemingly put to rest, the matter was resurrected almost one year later when, in a letter dated March 3, 1989, plaintiff demanded compensation in excess of $7,000,000 for the previous unconstitutional taking of his property. Pursuant to a letter dated March 15, 1989, defendant rejected this demand, asserting that it considered the matter fully litigated and the issue of damages to be moot. As a result, plaintiff commenced the instant action on June 27, 1989, demanding, in addition to compensation for the unconstitutional taking, treble damages pursuant to MCL 600.2907; MSA 27A.2907, alleging that the maintenance of the unconstitutional zoning ordinance "for more than two decades resulted in the malicious vexation of plaintiff." Defendant moved for summary disposition, asserting that plaintiff's action was barred by res judicata, citing MCR 2.116(C)(7) and (8), and MCR 2.203(A)(2). The trial court, reasoning that there was no signed release explicitly barring plaintiff from suing for money damages, denied the motion. Defendant's motion for rehearing was also denied. Defendant then applied for leave to appeal, which we granted.

We hold that plaintiff's claim for money damages is barred by res judicata, and accordingly, reverse the trial court's order denying defendant's motion for summary disposition.

The doctrine of res judicata is a manifestation of the recognition that interminable litigation leads to vexation, confusion and chaos for the litigants, resulting in the inefficient use of judicial time. *Rogers v. Colonial Federal Savings & Loan Ass'n of Grosse Pointe Woods*, 405 Mich 607, 615; 275 NW2d 499 (1979); *Sherrell v. Bugaski*, 169 Mich App 10, 12; 425 NW2d 707 (1988). The Michigan Supreme Court has adopted the "broad" application of the res judicata doctrine, barring both claims actually litigated in the prior action and those claims arising out of the same transaction which plaintiffs could have brought, but did not. *Gose v. Monroe Auto Equipment Co.* 409 Mich 147, 160; 294 NW2d 165 (1980); *Vutci v. Indianapolis Life Ins Co.*, 157 Mich App 429, 436; 403 NW2d 157 (1986). Res judicata applies to default judgments and consent judgments as well as to judgments derived from contested trials. In *re Cook Estate*, 155 Mich App 604, 609; 400 NW2d 695 (1986). The test as to whether two claims arise out of the same transaction and are identical for res judicata purposes, is whether the same facts or evidence are essential to the maintenance of the two actions. *Mazzola v. Vineyard Homes, Inc.*, 54 Mich App 608, 613-614; 221 NW2d 406 (1974); *Vutci, supra*, p 436.

It is clear to us that plaintiff's present claim arises out of the same transaction involved in the prior suit (i.e. an unconstitutional taking of plaintiff's property through application of defendant's zoning ordinance) and that a claim for money damages properly belonged in that suit.

Plaintiff argues, however, that he could not have brought a claim for money damages in the first suit because such a remedy had not been expressly recognized at the time that suit was initially filed. We disagree.

It was not until the United States Supreme Court decided *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 US 304; 107 S Ct 2738; 96 L Ed 2d 250 (1987), that it was first recognized that an award of damages was available as a remedy, pursuant to the just compensation clause of the Fifth Amendment, where a governmental land-use regulation has effected a temporary unconstitutional taking of property. Shortly thereafter, this Court applied the rationale of *First English*, and decided in *Poirier v. Grand Blanc Twp*, 167 Mich App 770, 777; 423 NW2d 351 (1988), lv den 431 Mich 913 (1988), that such a remedy was also available under the Michigan Constitution. Plaintiff's prior suit was still pending at the time each of these cases were decided. Thus, at the very least, plaintiff was clearly apprised of the possibility of claiming damages before termination of his prior suit. Amending his complaint to include a claim for money damages would have been a viable means for plaintiff to establish his claim for damages in that suit. Indeed, this is exactly what the plaintiff in *Poirier* did.

Moreover, the mere fact that the availability of damages had not been formally recognized in a judicial decision, as of the commencement of the prior suit, did not mean that plaintiff was precluded from asserting such a claim himself. This, after all, was not a situation where settled law had expressly rejected such a remedy. Indeed, the idea of awarding damages, and the possibility of plaintiff asserting such a claim, was discussed in our Supreme Court's decision in the prior lawsuit. See *Schwartz*, 426 Mich 315-316. The Court found the concept to be an "intriguing one," but declined to consider the issue,

noting that plaintiff had not asked for that type of relief. *Id.*

Plaintiff further argues that he could not have sought damages in the first suit, as he contends that such a claim does not accrue until a municipality has both terminated its unlawful taking and then refuses to pay. Accordingly, it is plaintiff's contention that his claim did not accrue until March 15, 1989, when defendant formally rejected his request for compensation. We disagree.

The Supreme Court made clear in *First English* that damages for the value of the use of land are not limited to the period subsequent to a judicial determination that a taking has occurred, but instead, must be calculated as of the time of taking. *First English*, 482 US at 306-307, 319-320. In doing so, the Supreme Court rejected the notion that a compensable taking does not occur until a challenged ordinance has been ultimately held invalid. *Id.* at 320. Moreover, plaintiff's argument ignores the fact that the plaintiffs in *First English* and *Poirier, supra*, both pursued their damage claims in the same suit in which an unconstitutional taking was alleged, not to mention our own Supreme Court's seeming acknowledgment of the possibility of pursuing damages in *Schwartz, supra*, 426 Mich at 315.

Accordingly, we reject plaintiff's arguments that he could not have brought a claim for money damages in the first lawsuit.

As previously noted, plaintiff's present claim for money damages arises out of the same transaction involved in the prior suit. While the issue of damages was not specifically raised in the former suit, we find, for

the reasons discussed above, that it clearly could have been. *Poirier, supra*. Accordingly, we conclude that plaintiff, having obtained a final judgment in the prior suit, is now barred by the doctrine or res judicata from presently pursuing his claim for money damages. Thus, we find that defendant's motion for summary disposition should have been granted.

Reversed.

/s/ Joseph B. Sullivan
/s/ Richard M. Maher
/s/ Richard Allen Griffin

---

[1] See US Const, Am V; Const 1963, art 10, § 2.

ORDER
Entered: October 11, 1991

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanaugh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Judges

90898

JOSEPH SCHWARTZ.

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

SC: 90898
COA: 121219
LC: 89-104678-NZ

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Levin, J., would grant leave to appeal.

70926

(seal) I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

October 11, 1991 /s/ Jacqueline B. MacKinnon
Deputy Clerk

ORDER
Entered: December 20, 1991

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanaugh
Chief Justice

Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate Judges

90898(36)

JOSEPH SCHWARTZ.

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

SC: 90898
COA: 121219
LC: 89-104678-NZ

On order of the Court, the motion for reconsideration of this Court's order of October 11, 1991 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Levin, J., would grant reconsideration and on reconsideration would grant leave to appeal.

91217

(seal) I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

December 20, 1991 /s/ Jacqueline B. MacKinnon
Deputy Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

JOSEPH SCHWARTZ and
LILLIAN SCHWARTZ,

Plaintiffs,

-vs-

THE CITY OF FLINT,

Defendant.

_____/

CASE NO:
71-20222-CZ

JUDGE
VALDEMAR L.
WASHINGTON

FINAL
JUDGMENT

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MICHAEL T. JOLIAT (P32086)
Attorneys for Defendant

_____/

A TRUE COPY
John H. Trecha,
Clerk

At a session of said Court held in the Courthouse, City of Flint, County of Genesee, State of Michigan, this 22nd day of April, A.D., 1988.

PRESENT: HONORABLE VALDEMAR L. WASHINGTON, Circuit Judge

The Supreme Court reversed and remanded this cause to the Court to "allow for a determination of reasonableness" of Plaintiff's proposed use of his property.

These parties have since engaged in negotiations and have stipulated and agreed that the plan of use of the property indicated in the annexed exhibit, which is herein incorporated by reference, is fair and reasonable and in the best interests of the parties hereto, thereby settling this action.

IT IS THEREFORE ORDERED, that Plaintiff, his heirs, successors and assigns shall be free to develop and utilize said property in accord with the annexed plan of use, notwithstanding the zoning classification currently set forth in the ordinance, but consistent with other municipal land use regulations.

IT IS FURTHER ORDERED that no costs or fees be awarded either party, a public question at issue having been settled.

VALDEMAR L. WASHINGTON
P-27165
HONORABLE VALDEMAR L. WASHINGTON
Circuit Judge

Approved as to form and substance:

/s/ Erwin B. Ellmann
Erwin B. Ellmann (P13168)
Attorney for Plaintiff

ALLOWED BY
CITY COUNCIL RESOLUTION
of February 8, 1988

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAR 10 1992
OFFICE OF THE CLERK

No. 91-1358

In The

Supreme Court of the United States

October Term, 1991

JOSEPH SCHWARTZ,

Petitioner,

v.

CITY OF FLINT,

Respondent.

Petition For Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Loyst Fletcher, Jr. (P-29799)
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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

IS PETITIONER PRECLUDED FROM PROSECUTING A 42 U.S.C. §1983 CLAIM FOR DAMAGES DUE TO AN UNCONSTITUTIONAL TAKING OF PROPERTY WHEN IT FAILED TO SEEK JUST COMPENSATION THROUGH THE APPROVED STATE PROCEDURE OF INVERSE CONDEMNATION?

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STATEMENT OF THE CASE

Pursuant to Rule 24.2 of the Rules Of The Supreme Court of the United States, it is necessary for Respondent to correct misstatements contained within and omissions from Petitioner's Statement Of The Case.

It its Statements Of The Case, Petitioner stated that "[i]n negotiating the judgment, Petitioner had expressly 'reserved' the right to file a subsequent claim for compensation (Affidavit of Jay Tower, §3)." (Pet. Br., p. 5). Petitioner failed to inform this Court that each person listed in Jay Tower's Affidavit denied the substance of his claim by way of their own Affidavit. A copy of each Affidavit was provided to the Trial Court, the Michigan Court of Appeals and the Michigan Supreme Court.

Petitioner also failed to inform this Court that in its Brief In Opposition To Respondent's Application For Leave To Appeal to the Michigan Court Of Appeals that it stated that Petitioner deliberately refrained from raising the issue of damages for fear that it would extend litigation in the original 1971 lawsuit.

Petitioner also failed to inform this Court that the Michigan Supreme Court in the predecessor to this case, being *Schwartz v City Of Flint*, 426 Mich. 295, 395 N.W.2d 678 (1986) addressed the issue of damages for an unconstitutional taking of property. In that case, the Michigan Supreme Court stated that "[p]laintiffs have not asked for that type of relief; nor would it be an appropriate way to terminate this particular litigation, given its history." *Id.* at 315, 316.

Further, Petitioner failed to inform this Court that the documents generated during settlement negotiations of the predecessor case clearly showed that the Petitioner intended to completely settle that case.

Petitioner also misstated or misrepresented Respondent's statement to the Trial Court regarding the ripeness of Petitioner's claim. In its Statement Of The Case, Petitioner stated that "[c]ounsel for the City himself acknowledged that under decisions of this Court, Petitioner had no federal cause of action for compensation while 'there was not a final determination of how the land could be used'." (Pet. Br., p. 5).

Counsel for the City never suggested that there had not been a final determination regarding the use to which Petitioner could put his land. Further, counsel for the City never suggested that Petitioner's federal cause of action was not ripe.

REASONS FOR DENYING WRIT

In reversing the Trial Court and granting Defendant/Respondent's Motion For Summary Disposition the Court Of Appeals held "that Plaintiff's claim for money damages is barred by res judicata . . . " *Schwartz v City Of Flint*, 187 Mich. App. 191, 466 N.W.2d 357, 359 (1991). The Court went on to state that:

> "It is clear to us that Plaintiff's present claim arises out of the same transaction involved in the prior suit (i.e. an unconstitutional taking of Plaintiff's property through application of Defendant's zoning ordinance) and that a claim

> for money damages properly belonged in that suit." 466 N.W.2d at 360

Petitioner seeks to have that decision overturned by claiming that the Michigan Court Of Appeals used a state procedural tool, res judicata, to preclude him from asserting his federal cause of action.

Through his Motion For Reconsideration to the Michigan Supreme Court and his Petition For Writ Of Certiorari to this Court, Petitioner has apparently conceded that his state claims are barred by res judicata. Therefore, the only issue that remains is whether or not the state court erred in precluding Petitioner from proceeding on his 42 U.S.C. §1983 claim. For the reasons set forth herein Respondent believes that Petitioner's Petition For Writ Of Certiorari should be denied.

The question before this Court is whether a party who fails to utilize an approved state procedure to obtain just compensation due to a temporary taking of property, and who is now barred by res judicata from utilizing that procedure, may prosecute a 42 U.S.C. §1983 claim for an unconstitutional taking of property.

This Court in *Williamson Planning Commission v Hamilton Bank*, 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 held that before a claim under 42 U.S.C. §1983 may be raised, there must first be a final determination by the governmental entity charged with implementing land use regulations as to the degree and intensity to which property may be utilized. The Court further held that "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the

procedure and been denied just compensation." *Id* at 195, 87 L.Ed.2d at 144.

Throughout these proceedings, Petitioner has erroneously stated that the "final decision regarding the application of the regulation to the property", *Williamson Planning Commission v Hamilton Bank*, 473 U.S. 172, 198, 87 L.Ed.2d 126, 139, did not occur until after the judgment was entered on April 28, 1988." (Pet. Br., p. 8). This is contrary to the Court's holding in *Williamson Planning Commission, supra,* which stated that:

> "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186, 87 L.Ed.2d at 139.

In addressing the issue of when the "final decision" occurs the Court in *Williamson Planning Commission, supra,* held that "the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual concrete injury . . . " 473 U.S. at 193, 87 L.Ed.2d at 143.

In interpreting the finality requirement the Michigan Supreme Court in *Electro-Tech v Campbell Co.*, 433 Mich. 57, 81, 445 N.W.2d 61 (1989), held that "[a]ccording to Williamson, requiring a final decision from the appropriate administrative body prior to initiating a §1983 action 'is compelled by the very nature of the inquiry required by the Just Compensation Clause.' " quoting *Williamson Planning Commission v Hamilton Bank*, 473 U.S. 172, 190, 87 L.Ed.2d 126, 105 S. Ct. 3108.

In the case at bar the "final and authoritative determination of the type and intensity of development legally permitted on the subject property", *MacDonald, Sommer & Frates v County Of Yolo, et al*, 477 U.S. 340, 348, 91 L.Ed.2d 285, 294, 106 S. Ct. 2561 (1986), had been made in 1971 by the Flint City Council. It was, at that time, that the City Council rejected Petitioner's request for a zoning change and definitively stated to what degree and intensity that Petitioner could use his property. It was also, at that point, that "the initial decision maker ha[d] arrived at [its] definitive position on the issue that inflict[ed] an actual concrete injury . . . " *Williamson Planning Commission v Hamilton Bank*, 473 U.S. at 193, 87 L.Ed.2d at 143, on Petitioner. Therefore, the first finality requirement as set forth by the court in *Williamson* was met in 1971.

"The *Williamson* Court set forth the finality requirements which must be satisfied before a Plaintiff may bring an action under §1983 for damages resulting from an unconstitutional regulatory taking." *Electro-Tech v Campbell Co.*, 433 Mich. 57, 81, 445 N.W.2d 61 (1989). In addition to there being a final determination as to the degree and intensity to which Plaintiff's property may be used, Plaintiff must also "seek compensation through the procedures the state has provided . . . ". *Williamson Planning Commission v Hamilton Bank*, 473 U.S. at 194, 87 L.Ed.2d at 143.

In its Petition For Writ Of Certiorari, Petitioner stated that it:

> "sought to determine 'what if any, compensation,' *MacDonald, Sommer & Frates v County Of Yolo*, 477 U.S. 340, 350 (1986), the City Of Flint

> intended to provide. His request for compensation was rejected outright by the City, March 15, 1989, many months after termination of the former suit. Only then did Petitioner have a ripened federal cause of action for just compensation." (Pet. Br., pp. 8, 9).

Petitioner's claim that its request for compensation satisfied the second finality requirement of *Williamson, supra,* is completely erroneous. The Court in *Williamson, supra,* held that:

> "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause, until it has used the procedure and has been denied just compensation." *Williamson Planning Commission v Hamilton Bank,* 473 U.S. at 195, 87 L.Ed.2d at 144.

In *Williamson, supra,* the State Of Tennessee permitted an aggrieved property owner to seek just compensation through a state inverse condemnation action. In Michigan the Court in *Electro-Tech v Campbell Company,* 433 Mich. 57, 61, 445 N.W.2d 61 (1989), held that:

> "before proceeding under 42 U.S.C. §1983, a property owner must first obtain a final decision from the particular governmental entity that is alleged to have unconstitutionally taken his property and also attempt to obtain just compensation through inverse condemnation."

In the case at bar, Petitioner never sought to recover compensation through an inverse condemnation action. Petitioner's failure to seek recovery through this adequate state procedure precludes him from proceeding on his §1983 claim. "Because [Petitioner] makes 'no claim

that the State Of [Michigan] does not have an adequate inverse condemnation law permitting citizens to recover just compensation for governmental takings', [Petitioner] failed to state a claim under the Just Compensation Clause." *G.M. Engineers and Associates v West Bloomfield Township*, 922 F.2d 328 (6th Cir. 1990) quoting *Four Seasons Apartment v City Of Mayfield Heights*, 775 F.2d 150, 151-152 (6th Cir. 1985).

The Courts have further held that the "[e]xhaustion of state law remedies is a prerequisite to maintaining a Taking Clause Claim in Federal Court." *Executive Act Studio v Charter Township Of Kalamazoo*, 674 F.Supp. 1288, 1293 (W.D. Mich 1987) citing *Williamson Planning Commission v Hamilton Bank, supra*. Petitioner's "failure to seek compensation through available state procedures is . . . fatal to [his] claim." *Christy v Servitto*, 699 F.Supp. 618, 654 (E.D. Mich. 1988), affirmed, 932 F.2d 502 (6th Cir. 1991).

In this case Petitioner failed to seek compensation through the available state procedure of inverse condemnation. A state claim for inverse condemnation was a recognized remedy available to Petitioner throughout his original litigation in this matter. In fact, the Michigan Supreme Court in the predecessor to this case specifically mentioned the use of inverse condemnation and an award of money damages for a temporary taking. See *Schwartz v City Of Flint*, 426 Mich. 295, 315, 316, 317, 395 N.W.2d 678, 686 (1986), n. 15.

Petitioner could have and should have raised a claim for inverse condemnation in his original litigation. Petitioner failed to assert his inverse condemnation claim and

is now bared from doing so due to res judicata. Petitioner's failure to seek compensation through an inverse condemnation action is fatal to his §1983 claim. *Christy v Servitto*, 699 F.Supp. 618, 654 (E.D. Mich. 1988), affirmed, 932 F.2d 502 (6th Cir. 1991). Therefore, the Michigan Court Of Appeals did not err in dismissing Petitioner's §1983 claim.

RELIEF

Respondent prays that this Honorable United States Supreme Court will deny Petitioner's Petition For Writ Of Certiorari.

Respectfully submitted,

DATED: 3-9-92

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